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NO. 87-1631

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DR. JACQYLYN DIGGS,

Petitioner

v.

HARRIS HOSPITAL-METHODIST, INC.,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Dr. Jacqulyn DIGGS,
Plaintiff-Appellant,

v.

HARRIS HOSPITAL-METHODIST,
INC., Defendant-Appellee.

No. 87-1631.

United States Court of Appeals,
Fifth Circuit

June 21, 1988.

Physican brought employment discrimination action against hospital as a result of hospital's terminating physician's staff privileges. The United States District Court for the Northern District of Texas, Eldon B. Mahon, J., entered judgment against physician, and physician appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) employee-employer relationship did not exist between physician and hospital which would confer upon physician standing to bring claim under Title VII, and (2) physician did not have claim under Title VII on ground that

hospital's action interfered with her employment opportunities with her patients, with whom she did not have employee-employer relationship.

Affirmed.

1. Civil Rights

Employee-employer relationship did not exist between physician and hospital which would confer upon physician standing to bring Title VII employment discrimination claim as result of hospital's terminating her staff privileges; there was no evidence that staff privileges at hospital were necessary to physician's practice or that denial of staff privileges at hospital hampered her ability to obtain staff privileges at other hospitals in community, hospital did not direct manner or means by which physician rendered medical care, physician was under no duty to admit any of her patients to hospital, and hospital did not pay physician for her services. Civil

Rights Act of 1964, §§ 701(b), 703(a)(1), as amended, 42 U.S.C.A. §§ 2000e(b), 2000e-2(a)(1).

2. Civil Rights

Physician did not have Title VII employment discrimination claim against hospital, which terminated physician's staff privileges, as result of effect such termination had on physician's employment opportunities with her patients, with whom she did not have employee-employer relationship. Civil Rights Act of 1964, §§ 703(a)(1), 706, as amended, 42 U.S.C.A. §§ 2000e-2(a)(1), 2000e-5.

Appeal from the United States District Court for the Northern District of Texas.

Before REAVLEY, GARWOOD and DAVIS, Circuit Judges.

REAVLEY, Circuit Judge:

Jacqulyn Diggs, a black female physician, brought a Title VII action

against the private, non-profit hospital that terminated her staff privileges. Following a bench trial, the district court denied Diggs all relief, ruling against her both on the ground that she lacked the capacity to bring suit under Title VII because she was not an employee of the defendant hospital, and on the merits. Because we find that Diggs failed to prove the existence of an employment relationship with which the hospital allegedly interfered, we affirm.

I. Facts and Proceeding Below.

Diggs received her M.D. degree from the University of Texas at Galveston in 1977, and completed a residency in obstetrics and gynecology at John Peter Smith Hospital, Fort Worth, Texas in 1981. She is licensed to practice medicine in Texas.

In July 1981, Diggs applied for staff privileges at Harris Hospital-Methodist,

Inc. ("Harris Hospital") in Fort Worth. Staff privileges permit a physician to admit her private patients to the hospital for medial treatment and to utilize the facilities and personnel of the hospital in caring for her patients. At Harris Hospital, physicians who have staff privileges are designated as appointed to the medical staff of the hospital. Diggs was initially appointed to the temporary medical staff at Harris Hospital, and in September 1981 she was appointed to the provisional medical staff.

Diggs retained her provisional status for the ensuing three years, during which time the hospital repeatedly considered termination of her privileges due to her failure to comply with the requirement of sponsor-observation imposed on provisional staff members, and concerns over several instances of perceived case mismanagement by Diggs. Following several warnings,

hearings, and reviews, the hospital terminated Diggs' staff privileges on August 28, 1984.

One year later, in August 1985, Diggs brought this suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. The action alleged discriminatory acts by Harris Hospital on the basis of race, sex, and/or in retaliation for a prior charge of discrimination. The district court entered judgment in July 1987 against Diggs, who now appeals.

II. Discussion

Congress enacted Title VII of the Civil Rights Act of 1964 to ensure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. Kremer v. Chemical Constr. Corp., 456 U.S. 461, 468, 102 S.Ct. 1883, 1890-91, 72 L.Ed.2d

262 (1982). Specifically, the Act provides in part that:

> (a) It shall be unlawful employment practice for an employer-
>
> (a) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

42 U.S.C. §2000e-2(a)(1) (emphasis added).

Our court has previously held that a Title VII claim must necessarily involve an employment relationship. Broussard v. L. H. Bossier, Inc., 789 F.2d 1158, 1159 (5th Cir. 1986). Further, it is well-settled in this circuit that we determine whether a plaintiff was an "employee" for Title VII purposes by applying the hybrid economic realities/common law control test

first advanced in Spirides v. Reinhardt 613 F.2d 826, 831 (D.C. Cir. 1979). See Broussard, 789 F.2d at 1160;[1] Mares v. Marsh, 777 F.2d 1066, 1067 (5th Cir. 1985). This circuit has not resolved the question of whether a person can bring a

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1/ Broussard, however, misstates the name of the test when it says "we have recently held that the economic realities test identified in Spirides v. Reinhardt guides the analysis of whether an individual is an employee for Title VII purposes. Mares v. Marsh." 789 F.2d at 1160 (citations omitted). The "economic realities" test is a more expansive standard for determining employee status, and one which our court expressly declined to adopt. Mares, 777 F.2d at 1067-1068 & n. 2. The test formulated in Spirides combines the economic realities test used in cases under the Fair Labor Standards Act with consideration of common law agency principles, focusing on the employer's right to control the manner and means of the worker's performance. Id. at 1067 & n. 2. Thus, we herein formulate the label "economic realities/common law control test" to indicate the test promulgated by the Spirides court.

Title VII action against an employer[2] who has interfered with that person's employment opportunities with a third party.

Diggs advances two alternate theories of Title VII coverage: (1) that she was an employee of Harris Hospital, and (2) that Title VII encompasses interference by an employer with a person's access to the employment market.

A. The Relationship Between Diggs and Harris Hospital

[1] If an employee-employer relationship existed between plaintiff Diggs and defendant Harris Hospital, undoubtedly Diggs has standing to bring a claim under Title VII. Harris Hospital does not dispute that it is an employer as defined by

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2/ For the purposes of Title VII, an "employer" is basically "a person [including an entity] engaged in an industry affecting commerce who has fifteen or more employees . . ." 42 U.S.C. §2000e(b).

Title VII. The question here, then, is whether Diggs' relationship with Harris Hospital was one of employee or independent contractor. While the parties agree that the economic realities/common law control test of Spirides is the appropriate standard, they disagree on the result of its application to the facts of this case. Harris Hospital argues that Diggs was an independent contract, while Diggs contends that she was an employee.

We agree with the district court that Diggs was not an employee of Harris Hospital for purposes of Title VII. The economic realities/common law control test considers the economic realities of the work relationship,[3] and the extent to

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3/ The economic realities test applied in cases under the Fair Labor Standards Act deems persons employees "if they 'as a matter of economic reality, are dependent upon the business to which they render service.'" Mares, 777 F.2d at 1067 (citation omitted).

which the one for whom the work is being done has the right to control the details and means by which the work is to be performed, with emphasis on this latter control factor. Mares, 777 F.2d at 1067. Additionally, courts are to consider the following factors in determining whether an employee-employer relationship exists for Title VII purposes:

> (1) the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision;
>
> (2) the skill required in the particular occupation;
>
> (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work;
>
> (4) the length of time during which the individual has worked;
>
> (5) the method of payment, whether

by time or by the job;

(6) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation;

(7) whether annual leave is afforded;

(8) whether the work is an integral part of the business of the employer;"

(9) whether the worker accumulates retirement benefits;

(10) whether the "employer" pays social security taxes; and

(11) the intention of the parties.

Broussard, 789 F.2d at 1160 (quoting Spirides, 613 F.2d at 832).

As a matter of economic reality, Diggs, as an obstetrician-gynecologist, is dependent upon having hospital staff privileges in order to pursue her medical practice. There was no evidence submitted at trial, however, that privileges at Harris Hospital were necessary to her

practice or that denial of staff privileges at Harris Hospital hampered her ability to obtain staff privileges at any other Fort Worth hospital. Furthermore, in determining her working relationship with the hospital, we are to focus more on the control factor. Mares, 777 F.2d at 1067. While the hospital supplies the tools, staff and equipment utilized by Diggs in delivering medical care at the hospital, and while it imposes standards upon those permitted to hold staff privileges, the hospital does not direct the manner or means by which Diggs renders medical care. Diggs is under no duty to admit any of her patients to Harris Hospital, and Harris Hospital does not pay her for her services.

Diggs treated her patients in Harris Hospital without direct supervision. As a provisional staff member she was required to have a sponsor present during surgical

procedures, but the purpose of that requirement was to have someone to attest to her essential qualifications, not to direct the details of the exercise of her skill. The hospital does not provide salary or wages to physicians with staff privileges, nor does it pay their licensing fees, professional dues, insurance, taxes, or retirement benefits. Diggs had staff privileges at several other Fort Worth area hospitals during the time she was on Harris Hospital's provisional staff.

B. Interference with Diggs' Employment Opportunities

[2] Diggs also contends that even if her relationship with Harris Hospital was not one of employment, the alleged discrimination falls within the scope of Title VII because Harris Hospital's actions interfered with her employment opportunities. We reject the argument for the reason that even if we were to hold that Harris

Hospital could violate the provisions of Title VII by interfering with Diggs' relationship with a third party--a question we do not reach, that relationship would have to be an employment relationship under the economic realities/common law contract control test discussed above. The employment opportunities to which Diggs points were her potential treatment arrangements with private patients. Diggs was not employed, nor did she seek employment, by a professional association. She has no Title VII claim.

Title VII does prohibit discrimnation "against any individual with respect to his . . . privileges of employment." 42 U.S.C. §2000e-2(a)(1) (emphasis added). Numerous courts have found that this language encompasses all situations in which an employer subject to Title VII has discriminatorily interfered with a person's employment opportunities, either with that

employer or with a third party. Pardazi v. Cullman Medical Center, 838 F.2d 1155, 1156 (11th Cir. 1988) (where Iranian physician denied staff privileges was unable to finalize employment contract with professional corporation); Gomez v. Alexian Bros. Hosp. of San Jose, 698 F.2d 1019, 1021 (9th Cir. 1983) (where hospital rejected contract proposal, allegedly on racial grounds, of professional corporation under which corporation's Hispanic physician-employee would have been the director of the hospital's emergency room); see also Note, The Liability of Third Parties Under Title VII, 18 U.Mich.J.L. Ref. 167 (1984). Because Title VII is remedial and humanitarian in nature, it should be liberally construed, resolving ambiguities in favor of the complainant. Spirides, 613 F.2d at 831; see also Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460-61 (5th Cir. 1970).

The opportunities interfered with must, however, be in the nature of employment relationships, as determined by application of the economic realities/common law control test adopted by our court. See Broussard, 789 F.2d at 1159; Gomez, 698 F.2d at 1021; Beverley v. Douglas, 591 F.Supp. 1321, 1327 (S.D.N.Y. 1984) ("There must be some nexus with an employment relationship for Title VII to apply, but the connection need not necessarily be direct."). Application of a different standard in third-party situations could result in permitting recovery to an independent contractor where the discriminatory practices of the defendant interfere with the plaintiff's working relationship with another party, but denying recovery where the plaintiff's working relationship is with the defendant.

The clear language of Title VII,[4] as well as the need for consistency, dictates application of one standard for determining employee status, regardless of whether the scrutinized work relationship is with the defendant or another party. A Title VII claim must involve discriminatory conduct that affects an employment relationship of the complainant, as determined by application of the economic realities/common law control test.

Under the above test, Diggs' relationship with her patients is decidedly not one of employment. Her patients did not

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4/ Title VII prohibits discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment . . ." 42 U.S.C. §2000e-2(a)(1) (emphasis added). Further, Title VII provides for enforcement of its provisions against one who engages in an "unlawful employment practice." 42 U.S.C. §2000e-5 (emphasis added).

control the manner and means of her professional treatment. A physician's work involves considerable skill. Further, patients do not furnish the equipment, instruments, supplies, and support staff used in a physician's rendition of medical care. Payment is for services rendered, not on-going compensation. Additionally, a physician provides care for numerous patients within a short period of time.

Because plaintiff has failed to establish any connection between Harris Hospital's alleged actions and an employment relationship involving Diggs, the decision of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DR. JACQULYN DIGGS	§	
	§	CIVIL ACTION NO.
VS.	§	4-85-557-E
	§	
HARRIS HOSPITAL-METHODIST, INC.	§	

JUDGMENT

This action came on for trial before the Court, Honorable Eldon B. Mahon, U.S. District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered, it is ORDERED and ADJUDGED that the plaintiff take nothing, and that the action be dismissed on the merits.

Entered this 20th day of July, 1987.

ELDON B. MAHON
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DR. JACQULYN DIGGS	§	
	§	CIVIL ACTION NO.
VS.	§	4-85-557-E
	§	
HARRIS HOSPITAL-METHODIST, INC.	§	

MEMORANDUM OPINION

This Court held a nonjury trial in the above-styled case commencing on January 26, 1987 and concluding on January 29, 1987. After a thorough review of the testimony, the evidence, the pleadings, and the applicable law, the Court makes the following determination.

FACTS

Plaintiff, Dr. Jacqulyn Diggs, brought suit against the defendant, Harris Hospital-Methodist, Inc., alleging that Harris Hospital discriminated against her on the basis of race and sex in violation

of 42 U.S.C. §2000e et seq. by terminating her medical staff privileges. Diggs is a black female. Harris Hospital is a private, not-for-profit corporation.

Diggs completed her residency at John Peter Smith Hospital in Fort Worth, Texas in obstetrics and gynecology. During her residency, Diggs spent six months on rotation at Harris Hospital as part of her training.

The physicians who have staff privileges at Harris Hospital have formed an organization known as the Medical Staff of Harris Hospital. The executive committee of the Medical Staff is the Medical Board. There are several committees of the Medical Staff, including a Credentials Committee, a Medical Staff Quality Assurance Committee, and a Division Quality Assurance Committee for the Division of Obstetrics and Gynecology (OB-GYN QA Committee). These committees were involved

in the decision to terminate Diggs' privileges at Harris Hospital.

The final decision on appointments, reappointments, and revocations of appointments to the Medical Staff are made by the Board of Trustees of Harris Hospital. However, such action is not made until after the Board of Trustees has received a recommendation from the Medical Staff. The Credentials Committee may grant temporary privileges to physicians at Harris Hospital. Such privileges permit a physician to admit patients to Harris Hospital so long as a sponsor signs the admittance form.

All initial appointments to the medical staff are to the Provisional Staff for a period of six months. After six months on the Provisional Staff, a physician is eligible to be elevated to the Active Staff and is reviewed by the Credentials Committee and the OB-GYN QA

Committee to determine whether the physician should be elevated.

Diggs was appointed to the temporary staff at Harris Hospital on July 14, 1981. Diggs was recommended by the Credentials Committee for appointment to the Provisional Staff on August 7, 1981. During the Medical Baord meeting of August 10, 1981, the Chief of the OB-GYN Committee, Dr. Abbott, stated that he was not satisfied with Diggs' training while present at Harris Hospital during her residency. This prompted the Medical Board to refer Diggs' application back to the Credentials Committee for further consideration. Dr. Abbott had never personally observed Diggs' work, however, it was his responsibility, as the chief of the department, to be knowledgeable about the work performed by the staff in the OB-GYN division. There is no evidence that

Dr. Abbott's concerns were motivated by racial or gender bias.

The Credentials Committee did consider Diggs' application further during its meeting on September 11, 1981. The chairman of the Committee "reported that the Chairman of the OB-GYN Department at John Peter Smith Hospital confirmed [Diggs'] professional competence but [stated that she was] a little lax in meeting her obligations." The Chairman of the OB-GYN Committee at John Peter Smith Hospital was Dr. Pelham Staples, who was one of Diggs' references and sponsors at Harris Hospital. There is no evidence that Dr. Staples was racially or sexually biased against Diggs. The Credentials Committee concluded their meeting by recommending that Diggs be appointed to the Provisional Staff with a request that her sponsors be unusually scrupulous in their observations of her.

The Medical Board adopted the recommendation of the Credentials Committee but added the further stipulation "that sponsors be required to actually scrub with Dr. Diggs." On September 28, 1981, the Board of Trustees appointed Diggs to the Provisional Staff. Diggs, at this time, was not informed that she would be monitored more closely than others on the Provisional Staff or that she needed to have a sponsor scrub with her.

On April 2, 1982, the Credentials Committee received a report from a nurse that Diggs violated the terms of her provisional appointment by operating on a patient without a sponsor present. The medical chart (368-673) for the patient in question indicates that Diggs performed the surgery in question without a sponsor present. Diggs admitted that she did not manage the case properly.

Diggs sent a request to the Medical Staff Office on May 7, 1982, requesting that she be promoted to the active staff. This was approximately 7-1/2 months after she was appointed to the provisional staff. In its meeting of May 18, 1982, the OB-GYN QA Committee reviewed Diggs' progress and recommended that Diggs' privileges be terminated because of her "flagrant" violations of her privileges with respect to case 368-673.

Pursuant to Diggs' request to be elevated to the active staff, the Chairman of the Credentials Committee advised Diggs' sponsors that her performance would be evaluated in July 1982. One of Diggs' sponsors, Dr. Bowen, recommended that Diggs be elevated to active staff without qualification. Another sponsor, Dr. McCoy, did not recommend that Diggs be elevated because he was not sure that her training was adequate. There is no evidence that Dr.

McCoy was motivated by racial or sexual bias.

Both the Credentials Committee and the Medical Board agreed that Diggs' privileges should be suspended and this recommendation was presented to the Board of Trustees. Diggs submitted a letter to the Board of Trustees on June 30, 1982 in which she admitted some mistakes with respect to usage of her sponsors and requested an opportunity to "reapply for provisional staff privileges."

At the suggestion of Dr. Abbott, the Credentials Committee reconsidered its earlier recommendation and decided to recommend that Diggs remain on the Provisional Staff under close supervision. The Medical Board concurred with the Credentials Committee's recommendation. The Board of Trustees renewed Diggs' provisional staff appointment and by letter dated August 3, 1982, informed her that one

of her sponsors must scrub with her on every case.

There is some discrepancy between the documents presented at trial and the testimony of Diggs as to her compliance with the requirement that provisional staff members have a sponsor present for their first twelve deliveries. The charts of patients treated by Diggs do not indicate that she had a sponsor present during her first twelve deliveries, however, Diggs testified that she met this requirement.

On August 9, 1982, a nurse informed the head nurse that Diggs needed to have a sponsor present at a delivery and that Diggs had not requested one to be present. On August 25, 1982, another nurse reported that Diggs did not have a sponsor present for a delivery. There is no evidence that either of these reports were made by nurses who were motivated by a racial or sexual bias against Diggs.

On August 25, 1982, after the second report of a delivery without a sponsor, the OB-GYN QA Committee, at the request of the OB-GYN Division Chief, conducted a special meeting to review Diggs' charts. There is no evidence that Diggs had sponsors present at the deliveries on August 2, 1982 and August 25, 1982. Diggs testified that she did not need to have a sponsor present at deliveries because she had completed her first 12 deliveries and because deliveries are not a surgical procedure. The OB-GYN QA Committee apparently disagreed with Diggs' interpretation of the word "surgery" since the minutes of the August 25, 1982 meeting state that Diggs displayed a general lack of compliance "with her granted privileges which specify that she have a physician assistant scrub in with her during surgery and have direct sponsorship observation of her work." The Committee also questioned Diggs' treatment

in four of the 33 cases which the committee reviewed. The OB-GYN QA Committee forwarded its findings to the Medical Staff QA Committee.

The Medical Staff QA Committee concluded that (1) Diggs' patient care failed to meet acceptable standards, (2) Diggs failed to comply with her sponsorship requirements, and (3) summary suspension of Diggs' privileges should be considered.

On September 10, 1982, the Credentials Committee decided to recommend that Diggs' privileges be terminated. On September 13, 1982, the Medical Board concurred in recommending that Diggs' privileges be terminated.

Diggs was given an opportunity to meet with the Medical Board on October 11, 1982. During the meeting, Diggs informed the Board that she did not pass the OB-GYN Examination and that she planned to take the examination the following year. After

this meeting, the Board decided to change its earlier decision and to retain Diggs on the Provisional Staff with the stipulation that she attend postgraduate courses in preparation for the OB-GYN Board Examination and that she fully meet the requirement of having a sponsor present at all deliveries and surgical cases.

At its November 16, 1982 meeting, the OB-GYN QA Committee decided to conduct quarterly reviews of Diggs' cases in light of the fact that their recommendation to terminate Diggs was rejected by the higher committees. On February 15, 1983, the OB-GYN QA Committee did the first of these quarterly reviews. The Committee reviewed two cases, finding that the care in one of the cases was satisfactory and finding that the care in the other case (#645-058) could not yet be evaluated because of discrepancies in the notes of Diggs and one of the nurses involved in the case. Subse-

quently, the Committee sent a letter to Diggs requesting that she detail the sequence of events involving case 645-058.

In its May 6, 1983 meeting, the Credentials Committee decided that it would soon begin a six month review of Diggs' cases. The Chairman of the Committee notified Diggs on May 11, 1983 that she needed to respond to the letter from the OB-GYN QA Committee about management of case 645-058 so that the Credentials Committee could consider the case in its review.

The minutes of the May 17, 1983, OB-GYN QA Committee meeting state that Diggs had not treated any patients at Harris Hospital since February 1983. Diggs did respond to the letters inquiring about the case 645-058 on May 23, 1983, stating that she properly cared for the patient in question.

On July 19, 1983, the OB-GYN QA Committee reviewed Diggs' cases for the period from February through June 1983. All seven of the patients reviewed had been admitted in June 1983, which was the month that Diggs was terminated at another local hospital. The Committee found that the management of the cases was adequate although one case involved a 1-1/2 hour laparascopy for which no reason could be identified.

On September 1, 1983, Diggs, along with three other black physicians, filed complaints with the Office of Civil Rights alleging that Harris Hospital engaged in discriminatory practices and procedures. Harris Hospital expressed a desire to work with the black physicians as to their concerns. In addition, some of the black physicians were appointed to the review committees on the medical staff. After

this action, the four physicians withdrew their complaints against the hospital.

On October 4, 1983, Diggs requested elevation to the active staff approximately two years after she was admitted to the provisional staff. The October 18, 1983 minutes of the OB-GYN QA Committee meeting state that in response to Diggs' request for elevation, the Committee reviewed 78 cases and had questions of Diggs' management of 16 of the cases. The Chairman of the Committee then sent a letter to Diggs on November 3, 1983, inviting her to come to the Committee's meeting on November 15, 1983 to discuss the 16 cases.

Diggs informed the Committee that she would not be able to discuss the cases until December. Accordingly, the Chairman of the Committee sent a letter to Diggs on November 21, 1983 informing Diggs that the meeting could occur no later than December

8, 1983. Diggs, by letter dated December 7, 1983 to the Chairman, stated that she would not attend the December 8, 1983 meeting. The meeting was rescheduled for February 7, 1984.

At the February 7, 1984 meeting, the Committee discussed 13 of the 16 cases with Diggs. On 11 of the 13 cases, the Committee questioned Diggs' treatment of the patient. By letter dated February 9, 1984, the Chairman of the OB-GYN QA Committee notified Diggs that they unanimously concluded that Diggs' privileges should be terminated. One of the physicians on the committee was a black physician, Dr. Henry.

The OB-GYN QA Committee's recommendation was forwarded to the Credentials Committee which invited Diggs and any other physician knowledgeable about Diggs' treatment to attend its meeting on March 9, 1984. Diggs accepted the invitation and brought one of her sponsors with her. She

informed the Committee that she disagreed with several of the conclusions of the OB-GYN QA Committee. She also told the Committee that her earlier problems with sponsors had been corrected. Finally, she informed the Committee that she had failed to pass the written part of the OB-GYN Board examination, and that she had not re-registered to take the examination again. At the conclusion of the meeting the Credentials Committee recommended that Diggs' privileges be terminated.

This recommendation was approved by the Medical Board on March 12, 1984. Diggs was notified of the Medical Board's decision and her right to a hearing before the Medical Board. Diggs met with the Medical Board on June 11, 1984 at which time she discussed with the Board each of the 13 cases which the other committees had considered. By letter dated June 14, 1984, the Chief of Staff informed Diggs that the

Medical Board would recommend to the Board of Trustees that Diggs' privileges be terminated "because of their continued concern with your practice in the area of judgment, sequence of care and comprehension of appropriate management." The Board of Trustees met on August 28, 1984, at which time they sustained the Medical Board's recommendation to terminate Diggs.

The Board of Trustees' decision only pertains to Diggs' right to admit patients at Harris Hospital. It does not relate to her rights at other hospitals.

DISCUSSION

In this suit, Plaintiff Diggs seeks declaratory relief, a mandatory injunction, and back pay under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. In order for Diggs to recover under this federal enactment, she must be an "employee" of Harris Hospital as defined by 42 U.S.C. §2000e(f) or an applicant for

employment of Harris Hospital. Although there is a split amongst the Circuit Courts as to the proper standard to apply in determining whether one is an employee or an independent contractor, the standard to apply in the Fifth Circuit has been clear since 1979. Spirides v. Reinhardt, 613 F.2d 826, 831 (5th Cir. 1979).

> "Consideration of all of the circumstances surrounding the work relationship is essential, and no one factor is determinative. Nevertheless, the extent of the employer's right to control the 'means and manner' of the worker's performance is the most important factor . . . If an employer has the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved, an employer/employee relationship is likely to exist."

Id. See also Mares v. Marsh, 777 F.2d 1066 (5th Cir. 1985).

This Court finds that Diggs is not an employee of Harris Hospital. At all times relevant to this suit, Diggs was a member of the voluntary probational staff at Harris Hospital. She was seeking elevation to the voluntary active staff at Harris Hospital. Diggs has a practice outside of the hospital and only comes to the hospital to perform tasks that she cannot perform at her office. Diggs is not paid a salary by Harris Hospital. Diggs does not receive insurance or retirement benefits from the hospital. In addition, Harris Hospital cannot require Diggs to admit patients into Harris instead of another hospital. Diggs was free to admit patients into any hospital at which she had privileges. In sum, based solely upon the facts in this case, the Court finds that Diggs was not an employee of Harris Hospital and, therefore,

that she is not permitted to bring a claim under Title VII against Harris Hospital.

Assuming arguendo that Diggs was an employee of Harris Hospital, the Court will address Diggs' claim under Title VII. For Diggs to establish a prima facie case of discrimination under the test in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) and its progeny, she must prove that (1) she belonged to a racial minority, (2) she was qualified to continue as a member of the provisional staff or to be elevated to the active staff, (3) she was not retained on the provisional staff or elevated to the active staff, and (4) she was replaced by a non-minority or that Harris Hospital continued to seek applicants with similar qualifications. Id. Chaline v. KCOH, Inc., 693 F.2d 477, 480 (5th Cir. 1982).

Based upon a thorough examination of the evidence, this Court finds that Diggs

did not satisfy the second requirement for a prima facie case. Diggs' treatment of her patients was evaluated by several Committees on the Medical Staff with the uniform conclusion that Diggs' patient care was not satisfactory. During the trial, Diggs questioned the judgment of the committees since she claimed that some of the facts upon which the committees reached their conclusion were not correct. However, these alleged factual misstatements did not have any bearing on the final conclusion of the committees. In other words, even if Diggs' version of the facts were true, the committees would still have reached the same result.

There is no evidence that any of the members of the committees exhibited any prejudice against Diggs because she was a woman or a black. There is an abundance of evidence which shows that Diggs' treatment was considered suspect and that she was

carefully scrutinized because of this. The committees found that Diggs' patient care was not satisfactory and they recommended that she be terminated. Instead of being terminated, she was allowed to remain on the provisional staff. The quality of work performed by Diggs continued to be suspect, and it was only then that she was denied further privileges at Harris. The chronology detailed above illustrates that Diggs was treated fairly by those who reviewed her work.

Diggs also alleges that she was retaliatorally discharged. In order to make a prima facie case of retaliation, Diggs must prove (1) that she was engaged in an activity protected by Title VII, (2) that an adverse employment action occurred, and (3) that there was a causal link between participation in the protected activity and the adverse employment decision. McMillan v. Rust College,

Inc., 710 F.2d 1112, 1116 (5th Cir. 1983). Diggs did engage in a protected activity when she, along with three other doctors, filed a complaint against Harris Hospital with the United States Office of Civil Rights. However, there is not a scintilla of evidence which indicates that the filing of the complaint had any bearing on the decision of Harris Hospital to deny her application for appointment to the active staff or to terminate her privileges as a member of the provisional staff. Thus, Diggs has not made out a prima facie case for retaliatory discharge.

Even if Diggs had made out a prima facie case under either theory discussed above, she would not be able to recover since Harris Hospital had a legitimate non-discriminatory reason for denying Diggs' privileges, namely, that her work was not satisfactory. Diggs has presented no credible evidence that Harris Hospital's

reason for denying Diggs' privileges was merely a pretext and that she was actually denied her privileges because she filed the complaint with the United States Office of Civil Rights.

In sum, this Court finds that Diggs is not an employee of Harris Hospital and, therefore, does not have a cause of action under Title VII. Furthermore, even if Diggs could bring a claim under Title VII, this Court finds that Harris Hospital did not discriminate against Diggs in its decision not to elevate Diggs to the active staff or in its decision not to retain Diggs on the provisional staff.

Signed this 20th day of July, 1987.

ELDON B. MAHON
UNITED STATES
DISTRICT JUDGE